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DONALD J. TRUMP,)	SUPERIOR COURT OF NEW JERSEY
)	APPELLATE DIVISION
Plaintiff/Appellant,)	DOCKET NO.: A-6141-08T3
)	ON APPEAL FROM THE
v.)	SUPERIOR COURT OF NEW JERSEY
)	LAW DIVISION - CAMDEN COUNTY
TIMOTHY L. O'BRIEN; TIME)	SAT BELOW
WARNER BOOK GROUP, INC.; and)	HONORABLE MICHELE M. FOX, J.S.C.
WARNER BOOKS, INC.,)	
Defendants/Respondents.)	ORAL ARGUMENT REQUESTED

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SUPERIOR COURT OF NEW JERSEY

BRIEF OF PLAINTIFF/APPELLANT DONALD J. TRUMP IN SUPPORT OF APPEAL

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Plaintiff Donald J. Trump ("Trump") submits this Brief in support of his appeal of the Trial Court's Order entering summary judgment ("the Order") in favor of defendants Timothy L. O'Brien ("O'Brien"), Time Warner Book Group, Inc. and Warner Books, Inc. (the "Warner Defendants") (collectively "Defendants"), the author and publishers of *TRUMP NATION, THE ART OF BEING THE DONALD* ("the Book" or "TrumpNation"). At issue in this appeal is the Trial Court's erroneous decision to grant summary judgment in favor of Defendants and, in the face of both the substantial evidence submitted by Trump in support of his claim and numerous disputed issues of material fact, to deny Trump his fundamental right to trial by jury.

PRELIMINARY STATEMENT

Trump is a successful and world renowned real estate developer, entrepreneur, author, and television personality. Trump's ability to close deals and secure financing for his projects depends, in large part, on his recognized status as a billionaire and the trust investors place in his business acumen and financial reputation. Together, these attributes enable Trump to marshal resources to accomplish what many would deem impossible.

In 2004, O'Brien, who had already published numerous negative articles about Trump, contracted with the Warner Defendants to write a sensationalized book in which O'Brien

essentially claimed he would reveal Trump as a fraud. Starting with the premise that Trump "owns nothing" and is all "smoke and mirrors," O'Brien wrote, and in 2005 Defendants published, *TrumpNation*. The Book is laden with false, defamatory and salacious "facts" about Trump. The most damaging of these are that Trump's net worth was only in the range of \$150-\$250 million - a fraction of other estimates which placed Trump's net worth in the billions of dollars, and O'Brien's repeated contentions that this low estimate of Trump's net worth was accurate and reliable and that estimates which calculated Trump's net worth to be in the billions were "fiction."

Although O'Brien would have the public believe that the Book was the product of extensive, independent research, and that it both fairly and objectively reports on Trump, the evidence demonstrates convincingly that the complete opposite is true. Indeed, O'Brien's claim that the \$150-\$250 million estimate of Trump's net worth was reliable because it was provided by three sources with access to Trump not only cannot be substantiated, but is completely incredible in light of the overwhelming contradictory evidence.

Hiding behind the Shield Law, O'Brien refused to disclose either the identity of the three sources or any information supposedly provided by them to support their low estimate of Trump's net worth. Therefore, with the exception of O'Brien's

own handwritten notes of purported interviews with his sources, there is no independent, corroborative evidence that the claimed informants even exist, much less any evidence that even suggests that those low estimates could be substantiated. On the other hand, Trump offered clear and convincing evidence in support of his claims, which establishes that all of the significant, objective evidence that was in Defendants' possession prior to their publication of the Book - including evidence that Trump's ownership interest in one property alone was worth nearly \$500 million - flatly contradicts those low estimates and substantiates those estimates which placed Trump's net worth in the billions.

Confronted with this genuinely disputed record, the Trial Court could not have entered the order it did without deciding material factual issues, without ignoring the fair inferences from the evidence offered by Trump that should have been drawn in Trump's favor, and without overlooking substantial credible evidence that O'Brien acted with at least reckless disregard in publishing false statements of Trump's net worth in the Book. Because these are issues for the jury, not the trial court, the summary judgment order should be reversed and the case remanded for trial by jury.

PROCEDURAL HISTORY

Trump filed his Complaint on January 23, 2006, to vindicate his name and reputation and to obtain redress for the damages Defendants inflicted as the author and publishers of *TrumpNation*. Pa8-Pa33. On May 15, 2006, Defendants moved to dismiss the Complaint. By Order dated August 30, 2006, the Honorable Faustino J. Fernandez-Vina, J.S.C., denied Defendants' motion, holding that Trump adequately pled actual malice, and that the Book was not protected by the fair comment doctrine.¹ Pa896-Pa897. On October 12, 2006, the Appellate Division denied Defendants' motion for leave to take an interlocutory appeal from Judge Fernandez-Vina's Order. Pa898.

During the course of discovery, Defendants, relying upon the newsperson's privilege, or "Shield Law," withheld entire categories of information and documents relating to anything Defendants deemed part of the "newsgathering" or "editorial" processes. Pa2609-Pa2645; Pa2646-Pa2683; Pa2735-Pa3126; Pa3308-Pa3487; see e.g., Pa2953 (privilege log entry referencing e-mail from T. O'Brien to R. Wolff and A. Blauner dated April 4, 2005, "regarding editorial and newsgathering processes as well as draft portion of work").

¹ Judge Fernandez-Vina's Order was the first in a series of Orders by three different trial court judges assigned to this case denying Defendants' repeated attempts to derail Trump's action and prevent this case from reaching a jury.

On Trump's motion to compel production, the Honorable Irvin Snyder, J.S.C., determined that New York substantive law, rather than New Jersey law, should be applied because New York had the most significant relationship to the occurrence and the parties. Pa1239-Pa1242. Applying New York law, Judge Snyder determined that New York's Shield Law (N.Y. Civ. Rights Law §79-h (2006)) did not protect Defendants and that no constitutional privilege entitled Defendants to withhold such information and documents. Judge Snyder accordingly, ordered Defendants to produce the withheld information. Pa951-Pa953. On appeal, however, the Appellate Division reversed, holding that New York's Shield Law applies to book authors and that Defendants are therefore protected from disclosing information relating to their supposed confidential sources. Trump v. O'Brien, 403 N.J. Super. 281, 301 (App. Div. 2008).

Despite this Order and Defendants' refusal to produce any information about O'Brien's sources for nearly two years, on November 21, 2008, Defendants voluntarily produced heavily redacted notes, which O'Brien claimed he took during interviews with his confidential sources. Pa768-Pa815; Pa3162. The production was apparently made in contemplation of Defendants filing for summary judgment.

On March 20, 2009, Defendants filed two summary judgment motions, one to dismiss Trump's claims, citing Trump's purported

failure to adduce any evidence of actual malice (relying heavily on the redacted notes), and the other for failure to prove damages. By Order entered July 15, 2009, the Honorable Michele M. Fox, J.S.C. (the fourth trial judge assigned to the case), granted the motion as to actual malice and denied the motion as to damages, without prejudice, as moot. Pa6-Pa7. This appeal timely followed.

STATEMENT OF FACTS

BACKGROUND - TRUMP

Trump's vast real estate portfolio has, at various times relevant to this matter, included extraordinarily valuable residential, commercial, casino, and golf course holdings worldwide. Trump also holds interests in, and earns revenues from, an array of enormously successful business ventures in the publishing, apparel, cosmetic, consumer, education and entertainment fields. His television shows *The Apprentice* and *The Celebrity Apprentice* are among the most highly rated, and he holds significant cash and personal investments. Pa2051 at 54:16; Pa2052 at 55:2; Pa2135 at 658:17-18; Pa2137. His net worth is in excess of \$6 billion.

Critical to Trump's success in business is the fact that he is widely recognized by both the financial community and the public as a skilled, successful businessman, who has financial resources totaling billions of dollars. See Pa2116 at 502:2-16. In the high risk, high reward real estate industry, Trump's ability to close deals and secure financing for his projects depends on investors trusting his reputation and net worth. See Pa2090 at 17:17-25; Pa2139; Pa2117 at 506:7-17.

BACKGROUND - O'BRIEN

Defendant O'Brien, an author and business reporter currently serving as editor of the Sunday Business Section of

The New York Times (Pa2144 at 27:2-6; Pa2145 at 33:13; Pa2146 at 35:11), has a history of using unprincipled reporting practices and demonstrating a personal bias against Trump. Pa1024-Pa1026; Pa2189-Pa2192; Pa317-Pa326; Pa2119 at 532:7-19. O'Brien began writing about Trump when he was still in school and served as a research assistant for Wayne Barrett on the 1992 book *Trump-The Deals and the Downfall*. Pa2147 at 35:22-36:20. In 1998, O'Brien wrote the book *Bad Bet: The Inside Story of the Glamour, Glitz, and Danger of America's Gambling Industry*, and reported on Trump's Atlantic City casino ventures. Pa2147. In March 2004, O'Brien published *Is Trump Headed for a Fall?*, which was the first in a series of negative articles questioning Trump's financial stability and business acumen. (Pa317-Pa326). O'Brien followed that article with *The Midas Touch, With Spin On It and Now, Reality for Trump Looks More like Survivor* (Pa327-Pa341), among others.

In a July 30, 2004 New York Times article, *Losses Increase as Cash Decreases, Straining Trump's Casinos*, O'Brien reported that Trump said he had a \$34.5 million stake in Trump Hotels & Casino Resorts (Pa1755-Pa1758), even though Trump had, and told O'Brien that he had, a stake worth \$49 million. See Pa2196. In an August 12, 2004 article, *Can Trump Afford Casino Stake?*, O'Brien again misrepresented Trump's finances, falsely stating that Trump needed to borrow \$455 million to make an investment

in Trump Hotels & Casino Resorts (Pa2197-Pa2198), when, in fact, Trump did not need to borrow the money. Pa2199-Pa2202.

In December 2004, the Warner Defendants contracted with O'Brien for the production, publication, and marketing of the Book (Pa501-Pa512), seemingly eager to be a part of O'Brien's self-described effort to "cut through all the smoke and mirrors of Trump's so called empire." Pa2193.

TRUMP GIVES O'BRIEN UNPRECEDENTED ACCESS TO HIS FINANCIAL INFORMATION AND REAL ESTATE PORTFOLIO

After learning that O'Brien was writing the Book, Trump gave O'Brien unprecedented access to himself, his staff and his financial documents, to insure that O'Brien had correct information. Pa2093 at 40:9-20; Pa2101 at 245:20; Pa2102 at 246:16; Pa2114 at 453:20; Pa2115 at 454:4. Over the course of a few months, Trump gave O'Brien more than twenty-five interviews and took him to view his properties in California, Florida, and Westchester, New York, among other places. Trump's Chief Financial Officer, Allen Weisselberg ("Weisselberg"), met with O'Brien on several occasions (see e.g., Pa832 at 199:1-200:18), as did Trump's in-house attorney, Michelle Lokey ("Lokey")², who also fielded countless phone calls from O'Brien. Pa2231 at 171:20; Pa2235 at 175:12.

² Lokey is also referred to in the record as Michelle Lokey Scarbrough. See Pa816.

On March 6, 2005, at O'Brien's request, Trump flew O'Brien to California to visit Trump National Golf Course, Palos Verdes. Pa2093 at 40:21-Pa2094 at 41:3. During the flight, O'Brien spent an hour reviewing Trump's 2004 Statement of Financial Condition (Pa2093 at 40:21; Pa2094 at 41:10-19), which identified and quantified Trump's assets and liabilities and estimated that his net worth was \$3.5 billion.³ Pa3660-Pa3684; see Pa2156 at 249:21-Pa2157 at 250:19. That estimate, as was expressly noted in the Statement (Pa3665), did not include any value for the "Trump" name, an infinitely valuable asset in its own right, which Trump has successfully leveraged to create an entire portfolio of branded real estate projects, businesses and consumer goods. Pa2079 at 328:17; Pa2080 at 329:12; Pa2051 at 54:2-Pa2052 at 55:1; see also Pa2156 at 249:6; Pa2156 at 250:21; Pa2157 at 250:21. Once in California, however, O'Brien declined to visit Trump National (saying he had something else to do), and, despite its significant value, never mentions the golf course in the Book. Pa2094 at 41:20-22; Pa2095 at 42:6-10.

In April 2005, after O'Brien told Trump that he believed Trump "owned nothing" (see Pa2072 at 217:15-20; Pa2096 at 43:13-15; Pa2097 at 44:20-23), Trump instructed Weisselberg and Lokey to assemble evidence of Trump's ownership of his various

³ Net worth is calculated as assets minus liabilities. Pa2240 at 40:3-7.

properties, including the deeds to the key properties in Trump's portfolio. Pa2204 at 43:20-Pa2206 at 45:21; Pa2207 at 50:17-Pa2208 at 51:2; Pa2061 at 166:6-Pa2062 at 167:22. The documents compiled for O'Brien easily surpassed the scope of information Trump had ever provided to any member of the media.⁴ Pa2092 at 39:15-18. Among the records assembled were the documents that proved Trump's 30%, debt-free ownership interest in the West Side Yards, a riverfront property on the West Side of Manhattan, which spans 59th Street to 72nd Street, for which Trump's interest was valued at \$450 - \$500 million. Pa2291-Pa2394.

O'Brien met with Trump, Weisselberg and Lokey on April 21, 2005, in the board room of the Trump Organization's offices in Trump Tower. Pa2061 at 166:6025; Pa2155 at 248:11-15. During the meeting, Weisselberg generally explained the valuation of certain assets, and explained Trump's interest in various properties.⁵ Pa2068 at 202:8-19; Pa2069 at 208:14-24; Pa2072 at 217:12-20. Trump himself, for the second time, provided O'Brien with a copy of his 2004 Statement of Financial Condition (Pa2096 at 43:31-44:11; Pa2063 at 171:22-Pa 2064 at 172:6; Pa829 at 175:9-25), but O'Brien was disinterested, merely glancing at it

⁴ The Trump organization is not a public entity and, therefore, is not required to make public filings. Pa2061 at 166:19-23.

⁵ Weisselberg did not, as O'Brien claims, go point-by-point through a list of assets in order to reach a \$5 billion figure, nor did O'Brien ask Weisselberg to provide any information in addition to what had been made available to him. Compare Book at 154 with Pa2065 at 183:8-19.

before putting it down. Pa2068 at 202:3-7. O'Brien was similarly disinterested in looking at any of the documents assembled. According to Lokey, after Trump and Weisselberg left the meeting, she offered to explain the documents, but O'Brien "was not terribly interested in the materials" and stayed seated. Pa2217 at 126:8-9. In fact, O'Brien confessed to Lokey that he did not need to see the materials because he already had the information he needed (Pa2217 at 126:15-24), and because, as he put it, "the Book's already written." Pa2218 at 130:7-8. O'Brien instead attempted to engage Lokey in what she described as uncomfortable and inappropriate personal conversation including O'Brien's unwelcome attempts at flirtation. Pa2222 at 136:25-Pa2227 at 149:13. Before he left, O'Brien met Trump in his office and spent approximately ten minutes reviewing Trump's Statement of Financial Condition-provided to him for the third time.⁶ Pa2098 at 45:16-21.

ISSUES ABOUND CONCERNING O'BRIEN'S RESEARCH (OR LACK THEREOF)

During discovery, O'Brien produced notes which he claimed he took during the April 21, 2005 meeting, to support his contention that he had reviewed the voluminous information made available to him. Pa2247-Pa2260. However, both Weisselberg and

⁶ Despite testimony from Weisselberg and Trump that O'Brien reviewed Trump's Statement of Financial Condition on at least three separate occasions, during his deposition O'Brien denied that he had ever seen it before his deposition. Pa2158 at 251:4-8.

Lokey disputed that O'Brien took any notes during the meeting.

As Lokey testified:

Q. But there's ten pages of notes here....

A. That weren't written at the time

Q. That weren't - he wasn't taking notes at the time?

A. I don't recall him writing this the entire time, no.

A. I don't recall him taking any notes.

Pa2220 at 134:9-18; see Pa2060 at 150:7-12.

Both Lokey and Weisselberg further questioned the authenticity of the notes O'Brien claimed he took during the meeting, pointing out that the notes attribute statements to them that they never made, and that the notes refer to topics that were not discussed during the meeting. Pa2073 at 220:13- Pa2075 at 223:25; Pa2077 at 248:2-24; Pa2214 at 117:6-18; Pa2219 at 132:2-13.

Lokey and Weisselberg both also recalled that O'Brien tape recorded the April 21st meeting, and Weisselberg testified that the tape recorder remained visible on the conference table throughout the meeting.⁷ Pa2059 at 149:12-Pa2060 at 150:6. O'Brien on the other hand, denies that he taped the interviews and claims that he did not even bother to bring his tape recorder to the April 21st meeting. Pa2159 at 275:24; Pa2160 at 276:25. Notably, O'Brien also denied taping an interview with

⁷ Trump also testified that O'Brien, the most sophisticated user of a tape recorder Trump had ever met, recorded every interview with him. Pa2099 at 71:18-Pa2100 at 72:12; Pa2102 at 246:9-25.

Weisselberg in early 2005, while driving to the airport to fly with Trump to Florida. However, Weisselberg specifically recalled that O'Brien did tape that interview (Pa2057 at 147:19-Pa2060 at 149:21), and testified that the very first question O'Brien asked him during that interview was: "[W]ould you mind if I tape this meeting?" (Pa2058 at 148:20-24), and he was "blown away," (Pa2058 at 148:11), and "totally shocked" (Pa2059 at 149:5-7) to learn that O'Brien denied taping the interview.

On June 2, 2005, O'Brien spoke with Lokey by telephone and again expressed skepticism that Trump was a 30% owner of the West Side Yards Property because Trump's name was not on the deed. Pa2236 at 186:19-Pa2237 at 187:4. Lokey reminded O'Brien that on April 21st, he had been provided with documents proving Trump's ownership interest in each of the partnerships listed on the deed, but she nevertheless explained Trump's ownership interest again. Pa2236 at 186:19-Pa2238 at 188:4. By the end of the conversation, O'Brien acknowledged that he understood that Trump possessed a 30% ownership interest in the West Side Yards, and that such interest was worth between \$450 million to \$500 million. Pa2237 at 187:22-Pa2238 at 188:14. In July 2005, some months before the Book was published, the West Side Yards project sold for approximately \$1.8 billion. The sale and the value of Trump's 30% interest were widely reported and O'Brien produced in discovery a copy of at least one *New York Times*

article he himself had obtained which reported on the sale and Trump's \$500 million share of the proceeds from the sale. Pa2395-Pa2396.

Issues also continue to surround whether O'Brien actually conducted the research he claims he did to confirm the accuracy of the information provided by his sources. Despite O'Brien's claims, the evidence establishes that such research was never done. Among other things, O'Brien testified that his research assistant, and recent journalism school graduate, Joseph Plambeck, spent "quite a bit of time" researching to confirm valuations for Trump's properties. Pa2175 at 690:11-Pa2176 at 691:3; Pa2177 at 694:8-Pa2181 at 698:9. Plambeck flatly denied that he did any such research, and denied that O'Brien ever even asked him to gather information about the value of Trump's real estate holdings, except for the West Side Yards. See Pa2264 at 25:21-Pa2266 at 27:13; Pa2271 at 42:21-23. Instead, Plambeck testified that O'Brien asked him to focus on Trump's "mojo," not Trump's financial condition. According to Plambeck, that was exactly what he did. Pa2280 at 137:4-6; Pa2278 at 135:25-Pa2280 at 137:6; Pa2269 at 40:25-Pa2271 at 42:9; Pa2272 at 64:21-Pa2275 at 67:18.

TRUMP'S DEMAND THAT THE FALSE AND DEFAMATORY INFORMATION IN THE BOOK NOT BE PUBLISHED IS IGNORED BY DEFENDANTS

In mid-October 2005, Defendants sent Trump an advance copy of the Book. Immediately struck by the enormity of the significant, false information contained in the Book (Pa3591 at ¶2), and aware that *The New York Times* would soon publish an excerpt, Trump took immediate action to stop publication. Both Trump and his attorneys wrote letters to Defendants and *The New York Times* notifying them that the Book contained false and defamatory statements, and demanding that the Warner Defendants cease and desist publication of the Book. Pa2284-Pa2286; Pa2246; Pa2229 at 165:18-Pa2230 at 166:14. Trump specifically told *The New York Times* that O'Brien's \$150 million to \$250 million net worth valuation was outdated and incorrect (Pa2284), and Lokey explained, for at least the third time, that despite the Book's statement to the contrary, O'Brien knew that Trump owned an interest in the West Side Yards, which by itself was more than double O'Brien's low estimate of Trump's total net worth. Pa2246. Trump's request for a meeting with the Warner Defendants was refused. Pa2285.

Despite knowing that the Book contained blatantly false and defamatory statements, on October 23, 2005, Defendants published an excerpt from the Book's "TrumpBroke" chapter on the front page of *The New York Times* Sunday Business Section. The excerpt

appeared under the headline of the article *What's He Really Worth?* (Pa741-Pa761), and was accompanied by a large graphic of Trump surrounded by question marks. Pa2287; Pa2184 at 731:11-21. The "TrumpBroke" chapter contains the most false and damaging statements in the Book. Pa2116 at 502:8-16; see e.g. Book at 154.

In "TrumpBroke," O'Brien repeatedly states that Trump lies about his finances, and refers to Trump's "verbal billions," his "verbal fortune," and his "ability...to magically add zeroes to his bank account." Book at 149, 152, 153, 156, 173, 174. O'Brien also rejects numerous credible valuations that accurately placed Trump's net worth in the billions of dollars (Book at 152; Pa741-Pa761), and adopts the valuation of his supposed confidential sources, writing that Trump "was not remotely close to being a billionaire" and that his "net worth was somewhere between \$150 million and \$250 million." Book at 154.⁸

"TrumpBroke" contains other false information, including O'Brien's conclusion that Trump's building at 40 Wall Street

⁸ Notably, The Book does not include any citations to the date or location of the purported interviews of the sources who supposedly gave O'Brien this information, despite the fact that such information was provided for every other anonymous source cited in the Book. Omitting that basic information was contrary to *The New York Times* standards, to which O'Brien claimed he adhered in writing the Book (Pa2288-Pa2290) and raises serious questions as to whether these sources actually exist.

essentially had no value (Book at 171-72), despite the fact that Trump purchased the property for \$1 million, and it was valued in excess of \$400 million in 2005. Pa833 at 241:22-Pa834 at 242:13; see Pa2054 at 126:13-Pa2056 at 128:11.

In a *New York Times* article, which contained excerpts from the Book, O'Brien repeated the Book's valuation of Trump's worth at between \$150 million and \$250 million, but also included a parenthetical that "Donald's casino holdings have recently rebounded in value, perhaps adding as much as \$135 million to these estimates." Pa751. The Book, which was published three days after the article (Pa2163 at 380:18-24), neglected to mention a rebound in value that alone would have approximately doubled O'Brien's net worth valuation. Book at 154.

FORBES ESTIMATES THAT TRUMP IS CONSERVATIVELY WORTH \$2.7 BILLION

After *The New York Times* article, *Forbes* expressed concern about the estimate it had published that placed Trump's net worth in the billions of dollars. See Pa1015; Pa2083 at 370:12-Pa2084 at 371:4. In response, Trump gave *Forbes* the opportunity to review all of the same information that Trump had made available to O'Brien in April. Pa2208 at 57:23-Pa2211 at 60:24; Pa2506. After its review, in October 2005, *Forbes* published its determination that its valuation of Trump's net worth, at \$2.7 billion, was not only accurate, but was conservative. As recalled by *Forbes* reporter Peter Newcomb, after he and others

spent nearly a day reviewing the books that had been equally available to O'Brien:

[Trump] opened up his books; there were probably about 30 books out there, we looked at the contracts, we looked at the leases and deeds. In fact, Donald does own quite a bit.

* * *

[Pa2506]

[W]e're going to stay on the low side and call it 2.7 billion.

Pa2508.

Newcomb also said that O'Brien's \$150 million to \$250 million figure was obviously wrong:

[Trump's] stake in [the] casino company alone is worth practically that, and he's got 40 Wall Street, he's got stakes in all sorts of buildings. You know, one thing that's very kind of hard to value, is kind of an intangible, is the Trump brand name, and if you look at the premium that Martha Stewart's getting for her company...you've got to figure Trump's got to be worth half a billion just the brand.

Pa2507 (emphasis added).

DEFENDANTS MARKET THE BOOK BY HIGHLIGHTING ONLY VICIOUS UNTRUTHS AND ENGAGING IN INAPPROPRIATE PERSONAL ATTACKS

The Warner Defendants provided substantive editorial oversight as O'Brien wrote the Book, and spearheaded the negative marketing campaign. See Pa2194-Pa2195; Pa2459-2461. Labeling Trump as "the wizard behind the curtain" (Pa2443), Defendants' aggressive marketing seized upon the most salacious,

damaging, and false information contained in the Book, and was punctuated by vicious personal attacks on Trump.

O'Brien's talking points for promotional events (Pa2457-Pa2458; Pa2462-Pa2463), designed to "throw some gas on the fire" (Pa2446; see Pa2439 at 110:24-Pa2340 at 111:24; Pa2433-Pa2434), focused particularly on O'Brien's claim that he could establish that Trump was not a billionaire:

- When you walk into one of those flashy skyscrapers bearing Donald Trump's name, remember one thing: *The Apprentice host owns almost none of them.* Donald is merely a glorified landlord whose pet projects are financed with other people's money. Pa2457 (emphasis added).
- *Donald isn't a billionaire either.* Although he inherited a huge fortune from his wealthy father, the Trumpster almost went personally bankrupt a decade ago and was forced to make humiliating phone calls begging his irritated siblings for handouts. Pa2457 (emphasis added).
- The story of how someone who is essentially a cartoon character became the most famous businessman in America. He's not Bill Gates, Warren Buffet or Jack Welch. He's a cross between Baby Huey and PT Barnum. Pa2462-Pa2463.

In other marketing materials, O'Brien called Trump a "self-described billionaire." Pa2460.

O'Brien also created a VidLit, a promotional video for the Book (Pa272 at 606:11-16), which O'Brien envisioned would be introduced by "carnavalesque" circus music and feature a "Trump doll." Pa273 at 609:3-611:14; Pa2465-Pa2466. The VidLit ultimately featured an audio recording of O'Brien reading one of

the Book's "Trump Quizzes" (Pa272 at 606:23-607:16), which appear at the end of each chapter (see Pa2468-Pa2480), and ask questions such as:

To emerge victorious on *The Apprentice*, you should:

- 1) Let a leech slither up your urethra.
- 2) Find out before the end of the season whether Donald actually owns any of the projects to which he'll assign you if you win.

Pa2469.

On October 31, 2005, O'Brien promoted the Book on CNBC's *Squawk Box* business program (another outlet in which he hoped to use the Trump doll), describing Trump as a "cartoon character." Pa2483-Pa2484; see Pa2481-Pa2482. When the program's host questioned O'Brien about the statements in the Book that Trump is worth only \$150 million to \$250 million, O'Brien responded that Trump "adds zeros here and there" (Pa2483), and "he is not worth [*Forbes'* estimate of] \$2.7 billion." Pa2484. Allan Siegal, the *New York Times'* standards editor, chided O'Brien following his *Squawk Box* appearance for O'Brien's improper, "ad hominem" attacks on Trump, in violation of *The New York Times'* standards on public appearances. Pa2485.

On November 12, 2005, during a promotional event at Coliseum Books in New York City, O'Brien engaged in a lengthy and malicious verbal attack on Trump. Pa2489-Pa2503. Admitting that he does not "take Donald seriously," (Pa2492), O'Brien

referred to Trump as a cartoon character and falsely stated that Trump's assets and net worth were an order of magnitude lower than previously reported (Pa2499); that "Trump is worth anywhere from \$300 to \$500 million" (Pa2498); that Trump "doesn't have much money to invest" (Pa2490); that "as a businessman he is a train wreck" (Pa2493); that his net worth is "definitely inflated"; (Pa2498) and that Trump "is the walking embodiment of financial pornography." Pa2503.

During a radio appearance on KNDD that aired the week of November 17, 2005, O'Brien again compared Trump to a cartoon figure and also described Trump as "a guy who has had a series of car crashes in his business career" (Pa2398), a "serial bankruptcy addict" (Pa2399), and the "court jester of the American business scene." Pa2399. When asked whether Trump is a good role model for aspiring entrepreneurs, O'Brien quipped, "only if their goals are to lose bales of money." Pa2400.

To counter O'Brien's charges that he was not a fraud, and that his net worth was in the billions of dollars, Trump commissioned a four page, full color advertisement that showcased his properties. At a cost of \$380,000, the advertisement ran in *The New York Times*, *The New York Times Magazine*, *New York magazine* and the *New York Post*. Pa2509-Pa2510. Despite his efforts to correct the record, the damage had been done. See e.g. Pa2504-Pa2505.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S DECISION WRONGFULLY DENIED TRUMP HIS RIGHT TO HAVE HIS CLAIMS DECIDED BY A JURY

The well established standard for deciding a summary judgment motion precludes entry of judgment by motion in this case. See R. 4:46-2 (summary judgment shall only be granted if "there is no genuine issue as to any material fact challenged."); Brill v. The Guardian Life Insurance Company of America, 142 N.J. 520, 529 (1995). In deciding a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986) (citation omitted). Therefore, it is not within the province of the trial court on a motion, to step into the role of the jury, to weigh the evidence, to make credibility determinations or to decide state of mind:

[T]hat the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge...

Id. at 255; see also Prozeralik v. Capital Cities Communications, Inc., 82 N.Y.2d 466, 478 (1993) ("the jury was rightly given the obligation of resolving credibility and the

competing versions of what happened."); Brill, 142 N.J. at 540 (it is not the trial judge's function "to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial."). Here, the Trial Court failed to apply these well settled standards, and erroneously chose instead to assume the role of fact-finder.

Specifically, the Trial Court granted Defendants' summary judgment motion even after identifying numerous factual disputes in its Order, whose resolution was central to the actual malice determination:

- Tr.⁹ at 14: "Defendants contend that as O'Brien reasonably relied upon the confidential sources, plaintiff cannot establish actual malice. But plaintiff in opposing defendants' motion contends that O'Brien formed his conclusions regarding Trump's millionaire/billionaire status before O'Brien even researched and wrote the book, that O'Brien's investigation was inadequate and incomplete and that O'Brien unreasonably relied upon the confidential sources...."
- Tr. at 24: "Defendants...cite to Trump's refusal to provide O'Brien with evidence of the full extent of Trump's liabilities" "Plaintiff argues that .Trump gave O'Brien 'unprecedented access to his finances...." Tr. at 27.
- Tr. at 27: "[P]laintiff notes that, despite the production and discovery by O'Brien of extensive notes purportedly taken by O'Brien at the meeting, neither Weisselberg nor Lokey 'recall O'Brien taking notes at the meetings'...Plaintiff also contends that O'Brien recorded the meetings, citing the presence of a tape

⁹ As used herein, "Tr." Refers to the transcript of the Trial Court's July 15, 2009 Opinion on Defendants' Motions for Summary Judgment.

recorder on the table, a contention which O'Brien denies."

- Tr. at 29: "Plaintiff contends that despite O'Brien's knowledge that Trump owned West Side Yards, O'Brien falsely published in the book that Trump did not own West Side Yards and that the sources' estimate of [\$]150 million to [\$]250 million of Trump's financial worth is less than half the value O'Brien knew that Trump had in West Side Yards alone. According to plaintiff..O'Brien 'recognized Trump's 30 per cent ownership interest in the West Side Yards and that it was worth [\$]450 million to \$500 million. O'Brien denies these allegations."
- Tr. at 30: "Plaintiff also points to the discrepancy between O'Brien's version of the role of Joseph Plambeck, his research assistant, in researching the book and Plambeck's more limited description of his role at Plambeck's deposition."

After reciting this litany of disputed facts, among others, the Trial Court concluded that, "[t]he evidence produced by Plaintiff does not establish the knowledge or doubt on the part of O'Brien sufficient to establish actual malice by clear and convincing evidence." Tr. 38:13-16. In order to reach this conclusion, the Trial Court necessarily, but erroneously, had to make factual findings and credibility determinations, and had to ignore the overwhelming weight of record evidence. As the non-moving party, Trump was entitled to the benefits of all inferences which could be drawn from the competing evidence and to have the disputed facts decided by a jury. See e.g., Masson v. New Yorker Magazine, 501 U.S. 496, 520 (1991) (all justifiable inferences must be drawn "in favor of the nonmoving

party, including questions of credibility and of the weight to be accorded particular evidence.") (citation omitted).

The Trial Court's decision to grant summary judgment in Defendants' favor improperly denied Trump his fundamental right to have a jury settle the record and make an ultimate determination as to the merits of his case. The Trial Court's analysis was improper as a matter of law, and, therefore, the summary judgment order should be reversed.

POINT II

ALTHOUGH THE SHIELD LAW GIVES DEFENDANTS THE RIGHT TO MAINTAIN THEIR SOURCE INFORMATION AS CONFIDENTIAL, THE SHIELD LAW DOES NOT OVERRIDE TRUMP'S RIGHT TO HAVE A JURY CONSIDER RELIABLE EVIDENCE THAT CONTRADICTS THOSE SOURCES

Although this Court previously held that information concerning O'Brien's supposed confidential sources is protected from disclosure under the Shield Law, the Shield Law does not protect O'Brien's reliance on those sources from scrutiny. Indeed, the Shield Law does not even come into play here, because Trump's objective, circumstantial evidence puts Defendants' reliance on O'Brien's supposedly confidential sources squarely in issue:

In some circumstances, public figures will be able to establish by inferential evidence the recklessness necessary to sustain a libel judgment. When a plaintiff can show that a defamatory report was published, and the author claims reliance solely on confidential sources, the trial court should consider whether the circumstances surrounding the publication warrant submission of the question of actual malice to the jury. The defendant in such cases, although under no legal duty to reveal its sources may decide to do so to rebut an inferential showing of actual malice.

Maressa v. New Jersey Monthly, 89 N.J. 176, 198-199, cert. denied 459 U.S. 907 (1982).

The only evidence supporting the estimates which placed Trump's net worth at between \$150 and \$250 million were the excerpts from O'Brien's own notes of his supposed interviews with confidential sources. On the other hand, Trump disputed

that evidence with substantial direct and circumstantial evidence, including evidence that:

- the \$150-\$250 million estimates of Trump's net worth were false;
- O'Brien did not conduct the investigation he claimed he did (for example, O'Brien's assistant denied that he ever researched the valuation of Trump's net worth as O'Brien testified he did);
- O'Brien lied about taking handwritten notes of other interviews;
- O'Brien lied about tape recording interviews with Weisselberg, Lokey and Trump;
- O'Brien received Trumps' 2004 Statement of Financial Condition, which included Trump's assets and liabilities, on at least three separate occasions;
- O'Brien deliberately disregarded objective information that was inconsistent with the low estimates he published; and
- O'Brien was motivated to publish false information about Trump-starting with his premise that Trump "owned nothing" and was a fraud.

This evidence not only raises genuine questions about whether Defendants' reliance on the sources was justified, it supported an inference of actual malice that should properly

have been drawn in Trump's favor. Schiavone Construction Co. v. Time, Inc., 847 F.2d 1069, 1090 (3d Cir. 1988) (the "requirement that we draw all inferences in favor of the non-movant is not inconsistent with the letter or spirit of *New York Times* actual malice determinations.").

Given that, whether O'Brien was justified in relying upon the information contained in the excerpted notes, or whether he acted with actual malice in publishing the false information, was a question for the jury. See Sands v. News America Publishing Inc., 560 N.Y.S.2d 416, 420-21 (App. Div. 1990) ("While it is essential that the media's quest for information on the broadest scale possible not be impeded by forcing disclosure of its confidential sources, we cannot ignore the rights of the opposing party in litigation who would in the ordinary course, against a non-media adversary, have access to that information."); see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (An individual's right to protect his or her own "good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'" (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966))).

The Sprewell case¹⁰ is not to the contrary. While the Sprewell court permitted defendants to rely upon confidential sources in support of their motion for summary judgment, and granted defendants' motion, the court did so only after the author defendant made a substantial showing of his extensive investigation to confirm the information provided by the confidential sources, including defendant's determination that "the 'evidence was mounting' that the eyewitness accounts were accurate." Id. at 9-10. Here, O'Brien did not confirm his sources, but rather, and unlike in Sprewell, O'Brien chose to altogether ignore "mounting evidence" pointing to the fact that the information provided by his sources' was both inaccurate and unreliable.¹¹

¹⁰ Sprewell v. NYP Holdings, Inc., 841 N.Y.S. 2d 7, 10 (App. Div. 2007).

¹¹ Perhaps most significantly, O'Brien ignored clear, objective documentary evidence of Trump's ownership interest in the West Side Yards (see Pa2291-Pa2394), and completely disregarded Lokey's repeated explanation of Trump's interest in that property. Pa2236 at 186:19-Pa2238 at 188:4.

POINT III

TRUMP OPPOSED DEFENDANTS' MOTION WITH CLEAR AND CONVINCING EVIDENCE SUFFICIENT TO SUPPORT A JURY FINDING THAT DEFENDANTS PUBLISHED WITH ACTUAL MALICE

Trump opposed O'Brien's motion with sufficient direct and circumstantial evidence that O'Brien either knew his sources' estimates of Trump's net worth were false, or that O'Brien recklessly disregarded the fact that those estimates were false. This was sufficient to support a jury verdict that O'Brien acted with actual malice, and at a minimum, was sufficient to survive Defendants' motion for summary judgment. See The New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (to establish actual malice, a plaintiff must show either that the defendant knew the published statements were false, or that the defendant acted with reckless disregard as to whether the statements were false); Costello v. Ocean County Observer, 136 N.J. 594, 614-615, (1994) (same); Freeman v. Johnston, 84 N.Y.2d 52, 56, cert. denied 513 U.S. 1016 (1994) (same); see also Maressa, 89 N.J. at 200 ("[i]f the recklessness approaches the level of publishing a knowing, calculated falsehood, the decision whether the defendant acted with reckless disregard for the truth should be submitted to the jury.") (citation omitted).

Because it is rare to find direct evidence of actual malice, a defamation plaintiff may prove actual malice by demonstrating "through direct or circumstantial evidence that

there were facts available to the defendant that did or should have aroused serious doubts as to the accuracy of the published material." First United Fund Ltd. v. American Banker, Inc., 485 N.Y.S.2d 489, 492 (Sup. Ct. 1985).¹² Evidence relevant to the actual malice inquiry is, therefore, not limited to a defendant's statement that he believed in the truth of the statements reported or objective evidence of what information was actually in a defendant's possession that demonstrates the falsity of the defamatory statements.

A jury may find actual malice on the basis of the cumulative evidence of the circumstances surrounding the defendant's investigation and efforts to confirm source information, evidence that the defendant was motivated by ill will to use information that was false, and evidence that the defendant disregarded information that contradicted the alleged defamatory statements. Maressa, 89 N.J. at 199 (citations omitted); see also DiLorenzo v. New York News, Inc., 1981 N.Y. App. Div. LEXIS 11522 (May 6, 1981) *7 (citation omitted) (although the actual malice standard is difficult "to apply to the varying circumstances of each case. . .the one constant

¹² With regard to the application of New York or New Jersey law, the Trial Court noted that both New York and New Jersey have an interest for choice of law purposes, but that the analysis of what conduct gives rise to actual malice would be the same under the law of both states. See Tr. at 16:18-17:7.

underlying the decisions in this area is that those varying circumstances, taken as a whole, must provide reasons to question the truth of the publication."). This is precisely the type of cumulative evidence Trump presented in opposition to Defendants' summary judgment motion.

Given the scope of the type of evidence relevant to a determination of whether a defendant acted with actual malice, the inquiry is not one "that easily lends itself to summary disposition." O'Neil v. Peekskill Faculty Ass'n, 507 N.Y.S.2d 173, 179 (App. Div. 1986). The trier of fact must consider the facts specific to the case, as well as "innumerable subtleties of the defendant's mind set and conduct. . . ." DiLorenzo, 1981 N.Y. App. Div. LEXIS 11522 * 7. (finding genuine issues of material fact from which a reasonable jury could find that defendants published with actual malice); see also Maressa, 89 N.J. at 197 n.10 ("summary judgment poses a more difficult problem where the issue is whether a defendant has published a defamatory falsehood with actual malice"); Hopkins v. City of Gloucester, 358 N.J. Super. 271, 280 (App. Div. 2003) (internal quotation omitted) ("ordinarily, where a party's state of mind is critical, and there is a genuine critical issue of material fact as to the state of mind, summary judgment should be denied since the issue of state of mind does not readily lend itself to summary disposition."); Schiavone, 847 F.2d at 1089 (citation

omitted) (the actual malice standard "is a subjective one, based on the defendant's actual state of mind. . . ."). Summary judgment was particularly inappropriate here given the substantial cumulative record of evidence that raises genuine issues about O'Brien's conduct and state of mind.

A. There Is Clear And Convincing Evidence To Support A Jury Finding That O'Brien Had Knowledge That His Sources' Estimates Were False

O'Brien had information that Trump's net worth was in the billions of dollars, yet despite that, O'Brien decided to publish his sources' false information that Trump's net worth was only between \$150 and \$250 million. Specifically, O'Brien knew that Trump's ownership interests in the West Side Yards and the "Trump" brand were each, individually, worth between \$200 and \$250 million more than his sources' estimates of Trump's total net worth, and he knew that the value of Trump's casino holdings at the time had rebounded by at least \$135 million. The evidence on each of these issues is clear.

In *TrumpNation*, however, O'Brien reported that Trump "doesn't own" the West Side Yards. Book at 172. O'Brien knew that statement was false, and knew that Trump, in fact, held interest in the West Side Yards worth between \$450 and \$500 million:

- O'Brien was shown documents during the April 21, 2005 meeting that proved Trump's interest in the West Side

Yards. Pa2291-Pa2394. In-house counsel Lokey and CFO Weisselberg also spent time with O'Brien that day explaining Trump's ownership interest. Pa2053 at 123:6-22; Pa2237 at 187:8-11.

- During a June 2, 2005 telephone call, Lokey again explained to O'Brien the ownership structure of the limited partnership that was formed to control the West Side Yards. Pa2236 at 186:21; Pa2237 at 187:21.
- At the conclusion of the same June 2, 2005 conversation, O'Brien conceded that Trump did, in fact, own a 30% interest in the West Side Yards that was worth \$450 million to \$500 million. Pa2237 at 187:22-Pa2238 at 188:14.
- One of O'Brien's fellow *New York Times* journalists wrote an article that identified Trump's interest in the West Side Yards. Pa2395-Pa2396.

O'Brien also knew that the "Trump" brand was an extraordinarily valuable asset in its own right, even,¹³ calling it "bigger than Coke and Pepsi" (Pa2413), and he knew that his sources' estimate of Trump's net worth as being between \$150-\$250 million did not include any valuation for the "Trump"

¹³ Peter Newcomb of *Forbes* conservatively estimated the Trump Brand to be worth half a billion dollars. Pa2507.

brand. Notwithstanding that, O'Brien recklessly published this low estimate as fact.

Similarly, in *TrumpNation*, O'Brien failed to include even a mention of the fact that Trump's casino holdings had rebounded significantly, even though in the *New York Times* article, O'Brien noted in a parenthetical that his sources' estimates did not account for that additional value of at least \$135 million. Pa751.

B. Trump Produced Clear and Convincing Evidence To Support A Jury Finding That O'Brien Had Reason To Doubt The Credibility Of His Sources And Published Their Estimates In Reckless Disregard Of Their Falsity

"[R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." St. Amant v. Thompson, 390 U.S. 727, 732 (1968). Thus, "[w]here the defendant finds internal inconsistencies or apparently reliable information that contradicts its libelous assertions, but nevertheless publishes those statements anyway, the *New York Times* actual malice test can be met." Schiavone, 847 F.2d at 1090 (citations omitted). That is precisely the situation presented here. The evidence clearly establishes that O'Brien started his endeavor as a scheme to portray Trump as a fraud, and continued that scheme even when confronted with proof that his premise was false.

O'Brien had significant reasons to doubt his sources' credibility. First, his sources' valuations were billions of dollars lower than any other valuation of Trump's net worth. Trump's 2004 Statement of Financial Condition, which was prepared by Trump's accountants, listed Trump's net worth at \$3.5 billion, and *Forbes* valued Trump's net worth conservatively at \$2.7 billion. Pa2507. O'Brien was presented with both valuations. Pa2498; Pa2096 at 43:3-Pa2097 at 44:11; Pa2063 at 171:22-Pa2064 at 172:6. After obtaining reliable information from independent sources that so severely contradicted his own, O'Brien was reckless in failing both to consider the probable falsities in his sources' statements and to question the credibility of his sources. See e.g., St. Amant, 390 U.S. at 732 (reckless disregard may be found "when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation").

Second, there is no question that O'Brien's "sources" provided unreliable information about Trump's businesses, including, for example, his interest in the West Side Yards. Because O'Brien falsely printed that Trump did not own an interest in the West Side Yards, O'Brien's sources must not have provided him with correct information, or, if they did, he purposely ignored it because it was inconsistent with the premise of the Book. By his own admission, the evidence in

O'Brien's possession at the time he published the Book established that Trump's West Side Yards interest was worth between \$450-\$500 million. Pa2237 at 187:22-Pa2238 at 188:14. O'Brien, however, deliberately chose to ignore this critical fact.

Third, the evidence strongly suggests that O'Brien was relying on outdated information or that he knew his sources had given him outdated information, but nonetheless, published it as current information. Approximately one year before publishing the Book, O'Brien published *The Midas Touch, With Spin On It*, in which he quoted three anonymous sources who estimated Trump's net worth at \$200 million to \$300 million, and described the sources as "people who have had direct knowledge of his holdings..." Pa332-Pa341 (emphasis added). The past tense suggested to the reader in 2005 that the information was not then current. In the Book - published a full year later - O'Brien attempted to revive the outdated report by changing the critical language used to identify his sources: the Book identifies the same sources as "three people with direct knowledge of Donald's finances..." Book at 154. The present tense suggested to the reader in 2005 that the information was current in 2005. O'Brien acknowledged the change, but did not think the change amounted to a "substantive difference." Pa2187

at 761:6-11.¹⁴

Fourth, O'Brien's claim that he believed his sources' estimates were credible because they took Trump's liabilities into account and other estimates did not, blatantly ignores the fact that the multi-billion dollar estimates did, in fact, account for liabilities. Trump provided O'Brien with significant liability information for properties including, but not limited to, Mar-A-Lago; Trump National Golf Club, Briarcliff, New York; Ocean Trails; Rancho Palos Verdes, California; Lamington Farm Golf Club; and Seven Springs, LLC (see Pa3167-Pa3169), including the documents reflecting every loan - to the extent there was one - for every project for which documents were produced on April 21st. Pa2212 at 92:12-17. In addition, Trump's 2004 Statement of Financial Condition, which O'Brien viewed on three separate occasions, included a detailed breakdown of Trump's liabilities. Pa2081 at 331:25-Pa2082 at 332:17; Pa2156 at 249:6-Pa2157 at 250:21; Pa2242 at 108:7-15.

¹⁴ In the Book, O'Brien included a citation to the date and place of each interview with anonymous sources, except for the supposed sources who provided the \$150-\$250 million net worth estimate. O'Brien's failure to provide such information is contrary to *The New York Times'* own standards for use of anonymous sources (Pa2288-Pa2290), to which O'Brien claims to have adhered in writing the Book (Pa2149 at 41:24-Pa2150 at 42:11), and a fact noted by Judge Snyder on December 20, 2006. Pa1247 at 38:13-23; Pa1249 at 43:16-24.

In the face of information that contradicted his sources, and armed with the knowledge that his sources' information was outdated, O'Brien had an obligation to resolve the inconsistencies and verify the information. See Pep v. Newsweek, Inc., 553 F.Supp. 1000, 1002 (S.D.N.Y. 1983) (a reasonable jury could find reckless disregard where reporter failed to interview critical witnesses and failed to independently corroborate information pulled from previously written stories); Scacchetti v. Gannett Co., Inc., 507 N.Y.S.2d 337, 339 (App. Div. 1982) (failure to corroborate source when there was ample time to do so will support finding of malice); Celle v. Filipino Reporter Enterprises Inc., 209 F.3d 163, 190 (2d Cir. 2000) ("official's lack of current knowledge suggested a reasonable basis for defendants to question the accuracy and reliability of the information he provided"). O'Brien chose to ignore that obligation and recklessly proceeded. That is sufficient to support a finding that O'Brien acted with actual malice and therefore, Trump had the right to present evidence of O'Brien's conduct to the jury.

C. O'Brien Purposefully Avoided Evidence Establishing Trump's Net Worth

In researching the Book, O'Brien had knowledge of information that directly contradicted the story he planned to write. See Pa2061 at 166:6-Pa2062 at 167:6; Pa2092 at 39:12-25.

Instead of writing the Book to fit the facts, O'Brien simply ignored the truth. Evidence establishing O'Brien's blatant disregard for the truth could not have been resolved on summary judgment and should have been presented to the jury.

It is undisputed that O'Brien saw documentary evidence on multiple occasions that directly contradicted his conclusions and substantiated every other professional valuation that consistently placed Trump's net worth in the billions. At the very least, such extreme inconsistencies should have raised serious concerns and caused O'Brien to conduct further research. O'Brien, however, never attempted to resolve the discrepancies, and as a result, purposely avoided the truth. This, as a matter of law, amounts to actual malice. See e.g., Prozeralik, 82 N.Y.2d at 477 ("Although failure to investigate will not alone support a finding of actual malice . . . the purposeful avoidance of the truth is in a different category.") (internal quotation omitted); see also DiLorenzo, 1981 N.Y. App. Div. LEXIS 11522 * 8 ("Coupling the ease of investigation with the lack of time pressure generally associated with 'hot news', a jury could find that the reporter's failure to check [the facts] evidenced a 'reckless disregard for the truth.'") (citation omitted).

O'Brien purposefully avoided learning the truth about Trump by failing to utilize the resources made available to him during

his visit to The Trump Organization on April 21, 2005. Trump arranged for the meeting six months before the Book was published in an effort to satisfy O'Brien's expressed belief that Trump did not own the properties he claimed to. Pa2061 at 166:6-11; Pa2096 at 43:3-Pa2098 at 45:24. During the April 21st meeting, O'Brien was given access to comprehensive information detailing Trump's private and public holdings, including ownership documents, loan documents, and Trump's Statement of Financial Condition, which placed his net worth at \$3.5 billion exclusive of the "Trump" brand. O'Brien also had the opportunity to ask questions. Pa2096 at 43:13 to 44:11; Pa2204 at 43:20-Pa2206 at 45:21. Trump placed no limit on the topics that could be discussed or information that could be made available.

If O'Brien had actually reviewed the materials Trump made available to him, he would have learned that Trump owned the properties he claimed Trump did not own, and could not have called Trump a "glorified landlord" who owns very few properties and who is worth only \$150 million to \$250 million. O'Brien reviewed the documents made available to him in only a cursory fashion and, instead of questioning key Trump Organization personnel in a meaningful way, he chose to try to engage them in casual, personal conversation. Pa2222 at 137:1-Pa2228 at 150:10. O'Brien's explanation for his disinterest in the

documents assembled for him was that the information was not important because "the Book's already written." Pa2217 at 126:5-24; Pa2218 at 130:2-21; Pa2228 at 150:9-10. O'Brien merely went through the motions of accepting Trump's invitation in an effort to create the false impression that he was doing the research a responsible journalist would do. Pa2227 at 149:20-Pa2228 at 150:10. Unfortunately, it was all a charade.

O'Brien also purposefully ignored the information contained in Trump's Statement of Financial Condition, which he was shown three times, and which established that Trump is a multi-billionaire. O'Brien's self-serving testimony that he never saw the Statement, (Pa2158 at 251:4-13), is contradicted by the testimony of both Trump and Weisselberg. Pa2094 at 41:10-15; Pa2095 at 42:19-Pa2097 at 44:11; Pa2098 at 45:16-21; Pa2063 at 171:22-172:6. Finally, although O'Brien claimed he relied on research on property valuation conducted by his assistant, his assistant denies that he conducted any such research.¹⁵

¹⁵ Putting aside Plambeck's denial that he ever conducted the research O'Brien claims he did, even if he had conducted that research, an unresolved question would still remain as to whether Plambeck was qualified to conduct research with respect to complicated financial and real estate transactions. When he was allegedly tasked by O'Brien to conduct this research, Plambeck had only recently graduated from journalism school, and he had no specific education or training in financial valuations, business or real estate. See Pa2277 at 134:16-Pa2278 at 135:13.

Whether O'Brien ignored evidence that directly contradicted the story he wanted to tell, was not a question that could be answered by the Trial Court. That question should properly have gone to the jury.

D. Defendants Published The Book After Being Alerted To The Fact That It Contained False Information

Defendants acted with reckless disregard for the truth by publishing the Book after being alerted to the fact that it contained glaring and egregious false statements. Upon receipt of a prepublication version of the Book, Trump and Trump's attorneys immediately wrote letters to *The New York Times*, which was planning to run an excerpt of the Book, and explained that the Book contained false information. Pa2284-Pa2286. *Times'* executives, including O'Brien's editor, discussed these letters with O'Brien. Pa3164 at 85:21-Pa3165 at 86:7. Nevertheless, O'Brien did nothing to correct, or even investigate, the Book's falsities. This is evidence of actual malice. See Curtis Pub. Co. v. Butts, 388 U.S. 130, 161 (1967) (failing to consult additional potential sources of information when questions as to story's falsity had been raised may be evidence of malice).

E. O'Brien Demonstrated A Clear Motive Of Hate, Ill-Will, And Spite Toward Trump

While evidence of O'Brien's ill-will, spite and hostility towards Trump, without more, may not be enough to prove that he acted with actual malice, when combined with other evidence, a

jury could fairly infer from the accumulation of evidence that O'Brien acted in reckless disregard of the falsity of the information he decided to include in the Book. See DiLorenzo, 1981 N.Y. App. Div. LEXIS 11522 *11 ("[T]he jury can permissibly consider malice among the other more obvious circumstances supporting the inference of actual malice."); Goldwater v. Ginzburg, 414 F.2d 324, 342 (2d Cir. 1969), cert. denied 396 U.S. 1049 (1970) ("There is no doubt that evidence of negligence, or motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity."); Kipper v. NYP Holdings Co., Inc., 12 N.Y.3d 348, 364 (2009) (evil intent or motivations stemming from ill will may be relevant in an actual malice inquiry).¹⁶ O'Brien's animus toward Trump was apparent.

In the year leading up to the Book's publication, O'Brien published twenty-one articles about Trump. See Pa2699-Pa2701.

¹⁶ As noted by the Honorable Michael J. Kassel, J.S.C., in his decision in connection with discovery motions, "That's evidential, whether or not you had any type of malice towards me, from which a jury could circumstantially then infer that you were recklessly indifferent about your claim. . . . But in a classic case, there is very little direct evidence of reckless indifference, it's all circumstantial. It's that a reasonable person would have known this was false, and show motivation to show...that the person would have a motive for being recklessly indifferent...The type of lay person ill will is frequently explored." Pa3208.

Each was negative.¹⁷ Pa3243-Pa3296. Several contained false statements about Trump and his financial condition. Pa3243-Pa3296. In August 2004, Trump's lawyers warned *The New York Times* that in his reporting about Trump, O'Brien relied on "sources who have false or incorrect information." They also had put the *Times* on notice that O'Brien had been harassing current and former employees of The Trump Organization, as well as Trump's current and former business associates, "attempting to coax them into making false, deceptive and misleading statements about Mr. Trump." Pa2199.

The Book itself takes every available avenue to injure Trump. The major premise of the Book is that Trump is a fraud, but O'Brien also used the Book to take aim at Trump's father, whom Trump holds in high regard, Trump's purported ties to organized crime and his prior marriages. O'Brien bragged about the Book that "parts of it will make [Trump] go ballistic." Pa3297. Marketing of the Book was aimed at belittling Trump, and focused on Trump's net worth according to O'Brien -- calling Trump a "faux billionaire" and "not a real billionaire;" Pa2457; Pa3300; Pa2462; Pa2164 at 441:17; Pa2167 at 444:21; Pa2397.

O'Brien used a "Trump doll" and circus music during his promotional appearances (Pa2171 at 609:3-Pa2173 at 611:14;

¹⁷ O'Brien admitted, for example, that *The Midas Touch, With Spin On It* was a negative article. Pa2154 at 158:16-22.

Pa2465), and he repeatedly referred to Trump as a cartoon character,¹⁸ despite the fact that his *New York Times* editor directed him not to do that. See Pa2151 at 101:2-Pa2153 at 103:25; Pa2462. O'Brien himself admitted that the marketing campaign routinely focused on "gossip" and the non-news elements of the Book. See Pa2168 at 445:9-446:14. When taken in combination with all of the other evidence in the record, including the information O'Brien had about Trump's true net worth, O'Brien's undisputed ill-will towards Trump and his belief that Trump is a fraud could clearly support a jury verdict in Trump's favor.

¹⁸ Following an appearance on CNBC, David Dillon, a close friend of O'Brien's helping to market the Book, circulated "just released pictures of Tim [O'Brien] backstage getting ready for the CNBC's Squawk Box [sic] Interview." The pictures appear to feature O'Brien's face superimposed on Robocop's body. One picture shows O'Brien/Robocop shooting a gun and saying, "Yeah, I said 'Baby Huey.' Now . . . who's gonna try to stop me?" Pa3306-Pa3307.

POINT IV

THE WARNER DEFENDANTS ARE LIABLE UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR

Under the doctrine of respondeat superior, a principal is liable for its agent's act of publishing a statement with actual malice if the statement is made within the scope of the work for which the agent was retained. See Cantrell v. Forest City Pub. Co., 419 U.S. 245, 253-54 (1974) (although there was no evidence establishing that publisher had knowledge of the inaccuracies contained in an article prepared by a news reporter, publisher was nonetheless liable under doctrine of respondeat superior for invasion of privacy, as the article was written within scope of employment with publisher); see also Loughry v. Lincoln First Bank, 67 N.Y.2d 369, 377 (1986) ("Consonant with risk allocation theories, liability for compensatory damages is properly placed on an innocent employer for slander by its agents committed in the course of employment.")

The key inquiry is whether the principal has the right to control the conduct of the agent within the scope of the work. See Mazart v. State, 441 N.Y.S.2d 600, 604-05 (Ct. Cl. 1981). The principal need not control every detail of the agent's conduct to be held vicariously liable; control can be found where the principal merely holds a right to make management and policy decisions affecting the agent. Id. at 605; see also

Nelson v. Globe Int'l, Inc., 626 F.Supp. 969, 978 (S.D.N.Y. 1986) (the relevant inquiry is whether publisher could "control the details of [the] work").

The evidence establishes that the Warner Defendants had the right and obligation to control the details of the Book, and that they did exercise editorial control. They withheld hundreds of documents and information called for in discovery on the basis of the newsperson's privilege, claiming that their documents and information represent the "editorial process." For example, the Warner Defendants withheld under the "editorial process privilege" or "newsperson's privilege" documents regarding draft portions of the Book, discussions of ideas for chapters of the Book, discussions of a possible related article for publication, plans for specific chapters of the Book, newsgathering related to the golf courses, legal advice about the TrumpBroke chapter, information procured from Trump during newsgathering, their opinion of the Book, dissemination and delivery of the Book, the timing of their announcement of the Book, and the decision to grant first serial rights to *The New York Times* for publication of an excerpt. The Warner Defendants simply cannot have it both ways. See e.g. Pa3078 (entry 8); Pa3099 (entry 124); Pa3120 (entry 192-194); Pa3488 (entry 1); Pa3490 (entry 9), and Pa3492 (entry 15).

Furthermore, O'Brien's agreement with the Warner Defendants gave the Warner Defendants editorial control. See generally Pa501-Pa512. Section 6(c) of the agreement states, in pertinent part:

If the Publisher determines in its good faith judgment that any or all of such delivered materials are unacceptable, the Publisher will provide written editorial comments to the Author, along with requests for revisions, and the Author shall deliver the revised work within 90 days thereafter.

Any request by the Publisher for changes or revisions in any portion of the Work shall constitute notice to the Author that the Work is not acceptable to the Publisher.

Pa505. Because the Warner Defendants were required to provide editorial comments to O'Brien if they found the materials to be unacceptable, and O'Brien was, in turn, required to make the Warner Defendants' revisions, the Warner Defendants had control over the details of the Book.

The evidence also establishes that the Warner Defendants actually exercised their editorial control on numerous occasions. For example, the Warner Defendants changed the Book's title and subtitle, and had their lawyers scrutinize particular chapters, including the TrumpBroke chapter. Pa3498 (entry 9). The Warner Defendants exercised editorial control over the photo spread that appears in the center of the Book, choosing which and how many permissions for each photograph. Pa3496. The Warner Defendants were responsible for the decision

to release galleys as part of the strategy to make Trump "go ballistic." Pa3499. As explained in one e-mail to O'Brien's agent: "It was decided not to embargo the book because we wanted to generate some excitement and buzz before it pubs. Clearly, if Mr. Trump takes exception to Tim's work and starts making noise...that will only help to excite the masses and that's a good thing, or at least that's the game plan." Pa3499.


The Warner Defendants exercised control by organizing and facilitating the marketing blitz during which O'Brien continued to defame Trump. The Warner Defendants were responsible for organizing radio and television appearances, book signings, and other promotional events. See Pa3505-Pa3506. O'Brien frequently deferred to the Warner Defendants in executing their marketing strategy, and the Warner Defendants frequently provided encouragement for O'Brien's defamatory actions relating to Trump. See Pa3300-Pa3302; Pa3501-Pa3509. Trump is entitled to present all of this evidence to a jury.

CONCLUSION

For all of the aforementioned reasons, Plaintiff/Appellant, Donald J. Trump requests that the Order of the Trial Court granting summary judgment in favor of Defendants on actual malice be reversed and that the case be remanded for trial.

Respectfully submitted,

STERNS & WEINROTH,
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By: 

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